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Preparatory Commission for the International Criminal Court

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Working Group on the Crime of Aggression
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Discussion paper proposed by the Coordinator

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Option 1: Add "such as a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

Option 2: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

Option 1: Add "in accordance with paragraphs 4 and 5".

Option 2: Add "by the Security Council of the United Nations".

3. The provisions of articles 25, paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate, under Article 39 of the Charter of the United Nations.

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5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State or invoke article 16 of the Statute within six months from the date of notification,

Option 1: the Court may proceed with the case.

Option 2: the Court shall dismiss the case.

Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

Option 4: the Court may request

Variant (a) the General Assembly

Variant (b) the Security Council, acting on the vote of any nine members,

to seek an advisory opinion from the international Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

Option 5: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)

Precondition

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition to the commencement of a prosecution for the crime of aggression that an appropriate organ[1] has determined the existence of the act of aggression required by element 5 of the following Elements.

Elements

1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

[1] See options 1 and 2 of paragraph 2 of part I.

5: An "act of aggression", that is to say, an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

> **Option 1**: Add "such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof".
>
> **Option 2**: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

8: The perpetrator had intent and knowledge with respect to Element 7.

Note:

Elements 2, 4, 6 and 8 are included out of an abundance of caution. The "default rule" of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.